

EX PARTE OR LATE FILED

ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ

(202) 326-7900
FACSIMILE:
(202) 326-7999

March 17, 2000

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

Notice of Ex Parte Presentation

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

MAR 17 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-4*

Dear Ms. Salas:

On March 16, 2000, Priscilla Hill-Ardoin, Paul Mancini, and Elizabeth Ham of SBC, and Antoinette Cook Bush and the undersigned representing SBC, met with Dorothy Attwood of Chairman Kennard's Office and Lawrence Strickling of the Common Carrier Bureau to discuss access to OSS, access to xDSL-capable loops, and hot-cuts.

A copy of this letter is enclosed. Please let me know if you have any questions about this matter.

Sincerely,



Austin C. Schlick

- cc: Ms. Attwood
- Ms. Stephens
- Mr. Strickling
- Ms. Wright
- Ms. Farroba, Texas PUC
- Ms. Heisler, DOJ
- ITS

No. of Copies rec'd 011
List ABCDE

ORIGINAL

EX PARTE OR LATE FILED

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST

WASHINGTON, D.C. 20005-3317

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ

(202) 326-7900
FACSIMILE:
(202) 326-7999

March 17, 2000

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

Ex Parte Submission

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED
MAR 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-4*

Dear Ms. Salas:

Attached for filing at the direct request of Commission staff are the recent Order and Judgment of the United States Court of Appeals for the Fifth Circuit in *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, No. 99-50073 (5th Cir. Feb. 24, 2000) (Tab 1 hereto). In that case, the Fifth Circuit granted SWBT's motion "to remand the issues raised in the appeals of AT&T and MCI pertinent to nonrecurring charges for existing combinations of network elements to the Public Utility Commission of Texas for further proceedings consistent with the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)." Fifth Circuit Judgment at 2 (emphasis added). Accordingly, the Texas PUC now plainly has the authority to resolve AT&T's and MCI's continuing challenges to the PUC's prior determinations regarding appropriate TELRIC-based non-recurring charges for the provision of existing combinations of network elements. On an interim basis, as described in Southwestern Bell's Reply, SWBT has voluntarily set non-recurring charges at zero for the migration of existing SWBT POTS service to the so-called UNE Platform, subject to true-up based on the outcome of the pending Texas PUC proceedings to resolve these issues. See Southwestern Bell Reply Br. at 57; see also Auinbauh Reply Aff. ¶ 42.

Southwestern Bell's Reply further demonstrated that the 1996 Act does not require incumbent LECs to create new combinations of network elements for CLECs. Accordingly, and contrary to the position of some commenters, the central office access charge ("COAC") assessed for assembling such new combinations need not be TELRIC-based. See Southwestern Bell Reply Br. at 56-57. Consistent with Southwestern Bell's

No. of Copies rec'd 0+1
List ABCDE

position, the Fifth Circuit did *not* indicate that the Supreme Court's decision required the Texas PUC to reconsider SWBT's prices as applied to *new* network element combinations. Instead, the Court remanded the entire case to the Texas PUC, Order at 3, but directed the PUC only to undertake further proceedings "pertinent to nonrecurring charges for existing combinations of network elements," Judgment at 2. We note that, although AT&T's February 29 *ex parte* continues to challenge the lawfulness of certain charges as applied to new combinations, AT&T fails even to mention the Fifth Circuit's February 24 decision contradicting its argument.

Also attached at the direct request of Commission staff are discussions of the retail and wholesale pricing of SWBT's Prepaid Home Service (Tab 2) and performance measurements 73 and 73.1 relating to interconnection trunk timeliness (Tab 3).

The original and one copy of this letter are enclosed. Please let me know if you have any questions about this matter.

Sincerely,



Austin C. Schlick

cc: Ms. Blue
Ms. Egler
Mr. Fried
Ms. Lien
Ms. Stephens
Ms. Wright
Ms. Farroba, Texas PUC
Ms. Heisler, DOJ
ITS

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

U.S. COURT OF APPEALS
FILED

FEB 24 2000

No. 99-50073

CHARLES R. FULBRUGE III
CLERK

SOUTHWESTERN BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

v.

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.,

Defendant-Appellee-Appellant,

v.

MCI TELECOMMUNICATIONS CORPORATION; MCIMETRO ACCESS
TRANSMISSION SERVICES, INC.,

Defendants-Appellants-Appellees

and

MFS COMMUNICATIONS COMPANY, INC; PUBLIC UTILITY COMMISSION OF
TEXAS; PAT WOOD, III, in his official capacities as Chair of the
Public Utility Commission of Texas and as arbitrator; JUDY W
WALSH, in her official capacities as Commissioner of the Public
Utility Commission of Texas and arbitrator; BRETT A PERLMAN, in
his official capacities as Commissioner of the Public Utilities
Commission of Texas and arbitrator; E*SPIRE COMMUNICATIONS, INC

Defendants-Appellees

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC

Plaintiff-Appellee-Appellant

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

Defendant-Appellee

v.

THE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION OF TEXAS

Defendant-Appellee

MCI TELECOMMUNICATIONS CORP, a Delaware Corporation; MCIMETRO
ACCESS TRANSMISSION SERVICES, INC, A Delaware Corporation

Plaintiffs-Appellants-Appellees

v.

SOUTHWESTERN BELL TELEPHONE CO, a Missouri Corporation

Defendant-Appellee

v.

PUBLIC UTILITY COMMISSION OF TEXAS; PATRICK H WOOD, III; JUDY W
WALSH; BRETT A PERLMAN

Defendants-Appellees

SOUTHWESTERN BELL TELEPHONE COMPANY

Plaintiff-Appellee

v.

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC

Defendant-Appellee-Appellant

v.

MCI TELECOMMUNICATIONS CORPORATION; MCI METRO ACCESS TRANSMISSION
SERVICES;

Defendants-Appellants-Appellees

v.

MFS COMMUNICATIONS COMPANY, INC; E*SPIRE COMMUNICATIONS, INC;
PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY W WALSH;
BRETT A PERLMAN

Defendants-Appellees

Appeals from the United States District Court
For the Western District of Texas

Before DAVIS, HALL* and SMITH, Circuit Judges.

PER CURIAM:**

ORDER

For a number of reasons, we are persuaded that this case should be remanded to the Public Utility Commission of Texas ("Commission").

First, the central issues raised on appeal by Appellees MCI and AT&T involve interpretation of the Supreme Court's recent decision in AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999), which was rendered after the Commission and the district court had reached their decisions in this case. Second, the issues raised by AT&T and MCI are substantially identical to those currently under consideration by the Commission. Finally, the ultimate resolution of this case will almost certainly require factual determinations best left to the discretion of the Commission.

The order of the district court pertaining to nonrecurring charges is therefore VACATED and the case REMANDED to the Public Utility Commission of Texas for further proceedings in light of the

*Circuit Judge of the Ninth Circuit, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 119
S.Ct. 721 (1999).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50073

U. S. COURT OF APPEALS
FILED

FEB 24 2000

CHARLES R. FULBRUGE III
CLERK

SOUTHWESTERN BELL TELEPHONE COMPANY

Plaintiff - Appellee

v.

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC

Defendant - Appellee - Appellant

v.

MCI TELECOMMUNICATIONS CORPORATION; MCIMETRO ACCESS
TRANSMISSION SERVICES, INC

Defendants - Appellants - Appellees.

and

MFS COMMUNICATIONS COMPANY, INC; PUBLIC UTILITY COMMISSION
OF TEXAS; PAT WOOD, III, in his official capacities as Chair
of the Public Utility Commission of Texas and as arbitrator;
JUDY W WALSH, in her official capacities as Commissioner of the
Public Utility Commission of Texas and arbitrator; BRETT A PERLMAN,
in his official capacities as Commissioner of
the Public Utilities Commission of Texas and arbitrator; E*SPIRE
COMMUNICATIONS, INC

Defendants - Appellees

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC

Plaintiff - Appellee - Appellant

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

Defendant - Appellee

v.

THE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION OF TEXAS

Defendant - Appellee

MCI TELECOMMUNICATIONS CORP, a Delaware Corporation; MCIMETRO
ACCESS TRANSMISSION SERVICES, INC, A Delaware Corporation

Plaintiffs - Appellants - Appellees

v.

SOUTHWESTERN BELL TELEPHONE CO, a Missouri Corporation

Defendant - Appellee

v.

PUBLIC UTILITY COMMISSION OF TEXAS; PATRICK H WOOD, III;
JUDY W WALSH; BRETT A PERLMAN

Defendants - Appellees

SOUTHWESTERN BELL TELEPHONE COMPANY

Plaintiff - Appellee

v.

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC

Defendant - Appellee - Appellant

v.

MCI TELECOMMUNICATIONS CORPORATION; MCI METRO ACCESS
TRANSMISSION SERVICES;

Defendants - Appellants - Appellees

v.

MFS COMMUNICATIONS COMPANY, INC; E*SPIRE COMMUNICATIONS,
INC; PUBLIC UTILITY COMMISSION OF TEXAS;
PAT WOOD, III; JUDY W WALSH; BRETT A PERLMAN

Defendants - Appellees

Appeals from the United States District Court for the
Western District of Texas, Austin

FOR THE COURT:

IT IS ORDERED that the motion of appellees, Public
Utility Commission of Texas, et al., for judicial notice of the PUCT
administrative proceeding reflected in Exhibits A and B is
DENIED AS MOOT.

IT IS FURTHER ORDERED that the motion of appellees, Public Utility Commission of Texas, et al., for summary disposition is DENIED AS MOOT.

IT IS FURTHER ORDERED that the alternative motion of the appellees, Public Utility Commission of Texas, et al., to affirm the district court's judgment is DENIED AS MOOT.

IT IS FURTHER ORDERED that the motion of appellee, Southwestern Bell, to remand the issues raised in the appeals of AT&T and MCI pertinent to nonrecurring charges for existing combinations of network elements to the Public Utility Commission of Texas for further proceedings consistent with the Supreme Court's decision in AT&T Corp. vs. Iowa Utils Bd., 119 S. Ct. 721(1999) is GRANTED as per February 24, 2000.

IT IS FURTHER ORDERED that the motion of appellant, AT&T Communications of the Southwest, Inc., to stay further proceedings in this court pending the PUCT's decision on AT&T's complaint is DENIED AS MOOT.

RESALE OF PREPAID HOME SERVICE

National ALEC Association/Prepaid Communications Association (“NALA/PCA”) expressed concern that SWBT offers its Prepaid Home Service (prepaid local exchange service) at a rate of \$39.00 per month (*see* SWBT’s Texas General Exchange Tariff, section 43, sheet 2¹), which is less than the rate NALA/PCA charge. NALA/PCA suggested that a reason why SWBT offers consumers lower prices is that “OSS charges” SWBT charges resellers are not “imputed” in SWBT’s retail rates. NALA/PCA Comments at 5.

The \$3.33 to \$5.00 mechanized charges that NALA/PCA characterizes as OSS charges are not OSS charges, nor even rates that apply to resellers in Texas. As shown in Texas 271 Agreement Attachment 6: Unbundled Network Elements, Appendix Pricing UNE, Schedule of Prices, page 16 of 16 (Auinbauh Aff. Attach A), the Texas PUC established conversion order charges for resold services of \$2.56 for simple orders. These charges apply when a CLEC converts an existing SWBT retail POTS service to CLEC resold service. For new services established by a CLEC using resold SWBT services, SWBT’s tariffed service connection charges – the same charges SWBT applies its retail customers, less the 21.6% wholesale avoided cost discount – apply. *See* Texas General Exchange Tariff, Section 27, “Service Connections, Moves and Changes;” *see generally* Auinbauh Aff. ¶¶ 20, 126-130, 151-153. These are not OSS charges, they are service order charges which allow SWBT the opportunity to recover the cost of customer service representative labor associated with processing service orders.

Prior to the SBC/Ameritech Merger Order, SWBT did assess OSS charges, as shown on page 12 of 16 of the Texas 271 Agreement’s Schedule of Prices. However, consistent with the Merger Order, SWBT waived those charges. *See* Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control*, 14 FCC Rcd 14712, 15009 (1999) (App. A § IX.35).

More broadly, NALA/PCA’s suggestion that its members cannot compete is grossly incorrect. As noted above, SWBT’s Prepaid Home Service, priced at \$39.00 per month to SWBT retail customers, is available for resale at the 21.6% avoided cost discount established by the Texas PUC. Under paragraph 48 of the Merger Conditions, 14 FCC Rcd at 15018, an even larger discount of 32% is available. *See* Southwestern Bell Br. at 120. More likely, NALA/PCA members would purchase SWBT’s basic local exchange service at rates that range from \$ 8.15 to \$11.05 (*see* SWBT’s Texas Local

¹ <http://info-search.sbc.com/data/tariff/data/pdf/texas/get.pdf#xml=http://info-search.sbc.com/search97cgi/s97_cgi?action=View&VdkVgwKey=data%2Fpdf%2Ftexas%2Fget%2Epdf&doctype=xml&Collection=Coll%5FTARIF&QueryZip=prepaid&&X1X>.

Exchange Tariff, Section 1²), less the applicable avoided cost discount. If the CLEC equips the service so that it is similar to SWBT's Prepaid Home Service, which includes call waiting (\$2.80 monthly per the Texas General Exchange tariff, section 10) and toll restriction (\$5.00 monthly per the Texas General Exchange Tariff, section 21), SWBT's retail rate is at most \$18.85 (\$11.05 + \$2.80 + \$5.00). Applying the standard 21.6% discount, the CLEC would pay SWBT \$14.78, leaving the reseller a margin of nearly \$15 per month to undercut SWBT's \$39 retail rate for Prepaid Home Service. Except in the case of a conversion of existing SWBT service to CLEC resold service (for which the CLEC would pay a \$2.56 service order charge as described above), the CLEC will pay the same service connection charges, less the avoided cost discount, that SWBT charges its own retail customers. The same retail service connection charges apply to basic residential service and to Prepaid Home Service.

² <http://info-search.sbc.com/data/tariff/data/pdf/texas/let.pdf#xml=http://info-search.sbc.com/search97cgi/s97_cgi?action=View&VdkVgwKey=data%2Fpdf%2Ftexas%2Flet%2Epdf&doctype=xml&Collection=Coll%5FTARIFF&QueryZip=prepaid&&X1X>.

Performance Measurements 73 and 73.1

Performance Measure 73 (Percentage Missed Due Dates – Interconnection Trunks). This measure reports all interconnection trunk installation due dates that were missed, except orders with customer caused misses (which is a Texas PUC-approved exclusion stated in the business rule). *See* Dysart Aff. Attach. A at 95.

Performance Measure 73.1 (Percentage Held Interconnection Trunks Greater Than 90 Days) This measure is a subset of the data reported in PM 73. This measure reports the percentage of interconnection trunk orders (less customer caused misses) held longer than 90 days and is disaggregated at 30, 60 and 90 days. Parity is determined based upon the percentage of orders held over 90 days. The numerator of this calculation would be the number of orders held over 90 days, while the denominator would be all missed orders (i.e., missed the customer desired due date or the 20 business day interval, whichever is longer). *See* Dysart Aff. Attach. K at 11. In discussing this measurement, Southwestern Bell's February 18, 2000 Ex Parte contained a statement intended to indicate that there were no held orders under the business rules applicable to the measurement, which is to say that there were no held order over 90 days. This was *not* intended as a statement that there were zero held orders between October 1999 and January 2000.